Supreme Court, U.S.
FILED

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No. _____

In the Supreme Court of the United States

HARDIE'S FRUIT & VEGETABLE—SOUTH, LP,
PETITIONER

v.

UNITED STATES OF AMERICA,
RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals for the Federal Circuit erred in refusing to vacate the decisions of the U.S. Court of Federal Claims and the Small Business Administration's Office of Hearings and Appeals.

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Plaintiff-Appellant and Petitioner: Hardie's Fruit and Vegetable Co.—South, LP

Defendant-Appellee and Respondent: The United States of America

Intervenor-Appellee: M&S Foods Co., Ltd.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.6, Petitioner submits now that Hardie's Fruit and Vegetable Co.—South, LP is a not a corporation and a publicly-held corporation does not own 10% or more of stock in the company. Further, there are not any parent corporations associated with Hardie's Fruit and Vegetable Co.—South, LP.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Federal Circuit on rehearing, dated October 1, 2009, is not reported, but is reproduced in Appendix A, at pgs. 11-12.

The opinion of the U.S. Court of Appeals for the Federal Circuit, dated July 14, 2009, is not reported, but is reproduced in Appendix B, at pgs. 13-14.

The Memorandum Opinion and Order of the U.S. l Court of Federal Claims, dated September 15, 2008, is not reported, but is reproduced in Appendix C, at pgs. 15-19.

The opinion of the United States Small Business Administration Office of Hearings and Appeals, dated July 14, 2008 is not reported, but is reproduced in Appendix D, at pgs 20-30.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Federal Circuit sought to be reviewed was entered on July 14, 2009, together with the order denying petitioner's motion for rehearing on October 1, 2009. The petition is timely under 28 U.S.C. §2101 (c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review judgment of the U.S. Court of

Appeals for the Federal Circuit under 28 U.S.C. § 1254(1) on a writ of certiorari.

STATUTORY PROVISION INVLOVED

The relevant statutory provision involved is 28 USC § 2106. The relevant statutory provisions are reproduced in the Appendix E, at pg. 31.

STATEMENT OF THE CASE

The U.S. Court of Federal Claims memorandum opinion from which this appeal was taken was a bid protest action under Solicitation No. SPM300-06-R-0008 for provision of Fresh Fruit and Vegetables to the Defense Supply Center Philadelphia, an agency that is part of the Department of Defense. In that action, Petitioner contended that Appellee, the United States, should not have made award under the Solicitation to Intervenor because Intervenor did not meet the definition of a "small business" for the purposes of the Solicitation which restricted award to only firms that qualified as a "small businesses" under relevant Small Business Administration regulations.

Respondent was the prevailing party at the trial court as evidenced in the trial court's September 15, 2008 memorandum opinion. Appendix C, at pgs. 15-19. Respondent was also the prevailing party in administrative proceedings before the Small Business Administration Office of Hearings and Appeals which preceded the action in the trial court, and which were reviewed by the trial court. Appendix D, at pgs 20-30.

Petitioner timely appealed the trial court judgment to the U.S. Court of Appeals for the Federal Circuit on November 24, 2008. On June 2, 2009, after completion of briefing but before oral argument, Respondent by unilateral action terminated the Solicitation, rendering the matters raised in the appeal moot. There were no settlement discussions, much less a settlement agreement, preceding Respondent's unilateral action. Accordingly, Petitioner moved for dismissal and vacatur of the trial court and underlying administrative decisions on the grounds that the appeal had been rendered moot by unilateral action of the prevailing party below.

On July 14, 2009, the United States Court of Appeals for the Federal Circuit issued a simple order granting Petitioner's motion to dismiss, but denying Petitioner's request for vacatur without opinion. On August 27, 2009, Petitioner filed a Combined Petition for Rehearing and Rehearing En Banc on the limited issue of whether the Federal Circuit panel erred in refusing to vacate the trial court's decision. On October 1, 2009, the Combined Petition was denied without opinion.

REASONS FOR GRANTING THE PETITION

A. MOOTNESS AS A RESULT OF UNILATERAL ACTION OF THE PREVAILING PARTY BELOW REQUIRES VACATUR

The record plainly shows that Respondent was the prevailing party before both the trial court and the SBA Office of Hearings and Appeals. Appendix D, at pgs. 20-30. It was not disputed that Respondent made

an entirely unilateral decision to cancel the federal procurement that was the object of litigation before the trial court and the SBA Office of Hearings and Appeals. There were no settlement discussions in either proceeding, and no settlement agreement. It was also not disputed by Respondent that Respondent's cancellation of the underlying procurement rendered the appeal before the Federal Circuit moot.

Accordingly, the Federal Circuit refused to vacate a trial court decision where appeal of that decision was rendered moot by the unilateral action of the party who prevailed in the lower court. This is plainly contrary to substantial controlling precedent of this Court, as well as precedent of the Federal Circuit itself. Arizonans for Official English, 520 U.S. 43 (1997); U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994); Aqua Marine Supply v. AIM Machining, Inc., 247 F.3d 1216 (Fed.Cir. 2001). This Court observed in Arizonans for Official English:

> When a civil case becomes moot pending appellate adjudication, "[t]he established practice ... in the federal system ... is to reverse or vacate the judgment below and remand with a direction to dismiss." Vacatur "clears the path for future relitigation" by eliminating a judgment the loser was stopped from opposing on direct review. Vacatur is in order when mootness occurs through happenstance-circumstances not attributable to the parties-or, relevant here, the "unilateral action of the party who prevailed in the lower court."

Arizonans for Official English, 520 U.S. at 71-72 (citation omitted). This echoes the holding of the Court in United States v. Munsingwear, 340 U.S. 36, 39 (1950), which observed that "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." Id. at 39. The Court in Munsingwear cited more than thirty prior decisions of the Court for the proposition that vacatur is the "standard disposition in federal civil cases" where a matter is rendered moot by unilateral action of the prevailing party below. Id. at 40

B. THE BONNER MALL EXCEPTION APPLIES ONLY TO MOOTNESS RESULTING FROM SETTLEMENT

In the years since Munsingwear, only one exception has been recognized to the requirement that the lower court decision be vacated where mootness is brought about by unilateral act of the prevailing party. That exception is where the unilateral act of the prevailing party was taken pursuant to a settlement of the matter in controversy between the parties. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. at 29; Aqua Marine Supply v. AIM Machining, Inc., 247 F.3d at 1221. The Supreme Court's decision in Bonner Mall expressly recognized the existing rule under Munsingwear that "vacatur must be granted where mootness results from the unilateral action of the party who prevailed in the lower court", and distinguished such unilateral action

from a settlement between the parties. U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. at 24. The Court further observed that:

> A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. The same is true when mootness results from unilateral action of the party who prevailed below. Where mootness results from settlement, however, the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.

Id. at 25 (citation omitted). There is nothing in Bonner Mall that can be read as any departure from the clear rule in Munsingwear that vacatur is always appropriate where mootness results from the unilateral action of the prevailing party below.

The clear weight of United States Supreme Court precedent does not leave open any legal basis for an appellate court to refuse to vacate the lower court decision where the prevailing party renders the matter moot on appeal by unilateral action.

As stated above, in the instant case, Respondent was the prevailing party at both the SBA Office of Hearings and Appeals and subsequently before the Court of Federal Claims. It was the unilateral action of Respondent in terminating the contract of the challenged awardee and cancelling the Solicitation

which rendered Petitioner's appeal moot. Respondent did not present any showing that the action was anything but unilateral on Respondent's part. Accordingly, it is clear that vacatur was required.

C. VACATUR SHOULD EXTEND TO SBA OHA's ADMINISTRATIVE DECISION

Vacatur in this case also extend to the decision of OHA that was challenged before the U.S. Court of Federal Claims. The decision of OHA, though not binding precedent, on any court, can itself have preclusive effect. Allied Painting & Decorating Co., SBA No. SIZ-3026, 1988 WL 219932 (S.B.A.). In the Allied decision, the protestor had previously filed a size appeal which, although it involved a different solicitation, "raised the identical issues and arguments here which it advanced" previously, and OHA found that the subsequent size appeal was barred by the doctrine of res judicata. Id. at *1; see Global Solutions Network, Inc., SBA No. SIZ-4937, 2008 WL 1971358, (S.B.A.).

In the instant case, if Respondent issues a new small business set-aside solicitation for the same requirement and the same challenged awardee is once again selected as awardee, then Petitioner would again protest. If the SBA Office of Hearings and Appeals decision in the instant case is not vacated, Respondent and that awardee may argue that, under the principles recognized in Allied Painting, supra, such future protest would be similarly barred. That result would defeat the purpose of a dismissal for mootness of "clear[ing] the path for future re-litigation by eliminating a judgment the loser was stopped from

opposing on direct review." Arizonans for Official English, 520 US at 71-72.

Accordingly, it is clear that vacatur of both the Court of Federal Claims judgment of September 15, 2008 and the July 15, 2008 decision of the Small Business Administration's Office of Hearings and Appeals was not only warranted, there was no legal basis for this Court to do otherwise.

CONCLUSION

The United States Court of Appeals for the Federal Circuit in this case erred in denying Petitioner's request for vacatur of the trial court's judgment and the administrative decision of the SBA Office of Hearings and Appeals underlying that judgment. It is clear from well-established precedent of this Court that it is a necessary duty of an Appeals Court to vacate a lower court decision where the prevailing party below renders the appeal moot by unilateral action.

WHERFORE, Petitioner respectfully requests that this petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2009-5018

Hardie's Fruit and Vegetable Co. – South, L.P.,
Plaintiff-Appellant

v.

UNITED STATES,
Defendant-Appellee,

And

M&S FOODS CO., LTD.,
Defendant-Appellee.

ORDER

A combined petition for panc rehearing and for rehearing en banc having been filed by the Appellant, and the petition for rehearing, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on October 8, 2009.

FOR THE COURT

/s/ Jan Horbaly

Jan Horbaly
Clerk

Dated: 10/01/2009

cc: Johnathan M. Bailey
David M. Hibey, Isaias Alba, IV

HARDIE'S FRUIT AND VEGETABLE V US, 2009-5018
(CFC – 08-CV-534)

APPENDIX B

United States Court of Appeals for the Federal Circuit

No. 2009-5018

HARDIE'S FRUIT AND VEGETABLE CO. – SOUTH, L.P.,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee,

And

M&S FOODS CO., LTD.,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 08-CV-534,

Senior Judge Robert H. Hodges, Jr.

ON MOTION

ORDER

Hardie's Fruit & Vegetable Company-South, LP ("Hardies") moves to dismiss this appeal for mootness and vacate the September 15, 2008 judgment of the Court of Federal Claims and the July 15, 2008, decision of the Small Business Administration's Office of Hearings and Appeals ("SBA"). The United States opposes the request to vacate the aforementioned judgment and decision.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The Motion to dismiss is granted.

(2) The motion to vacate is denied.

(3) The mandate will issue in due course.

FOR THE COURT

Dated: July 14, 2009 /s/ Jan Horbaly

Jan Horbaly

Clerk

cc: Johnathan M. Bailey
Isaias Alba, IV
David M. Hibey

APPENDIX C

In the United States Court of Federal Claims

No. 08-534C

Hardie's Fruit & Vegetable Co. – South, LP
Plaintiff,

v.

United States of America,
Defendant.

September 15, 2008, Filed

ORDER

This pre-award bid protest is before the court on the parties' cross-motions for judgment on the administrative record. Plaintiff challenges a ruling of the Small Business Administration Office of Hearings and Appeals and Appeals that intervenor is qualified to compete for a small business set-aside contract. An administrative law judge found that Intervenor's reliance on a large business subcontractor for certain products and services did not affect its status as a small business contractor. The Agency's decision is not unreasonable in the circumstances presented. We must deny plaintiff's petition for a permanent injunction and dismiss its complaint.

The Defense Supply Center Philadelphia is a department of the Defense Logistics Agency. It issued a solicitation in July 2006, seeking bids on an indefinite delivery, indefinite quantity, small business

set-aside contract for delivery of fresh fruit and vegetables to numerous government facilities. The administrative law judge stated that the procurement was classified as a manufacturing contract and assigned North American Industry Classification Code 424480, Fresh Fruit and Vegetable Merchant Wholesalers. Administrative Record at 738 (*Size Appeal of M&S Foods Ltd. Co.*, SBA No. SIZ-4971 (July 14, 2008)). The associated small business size standard for offerors is 500 employees. Offerors would be required to grow the produce themselves or acquire it from other small businesses.

The agency determined that no small business could provide the fresh produce required under the solicitation. The contraction officer sought from the Small Business Administration a waiver of the "nonmanufacturer rule" before issuing the solicitation. The nonmanufacturer rule requires that small businesses obtain the goods to be supplied under the contract from other small businesses. *See* 13 C.F.R. §121.406(b). SBA granted the waiver on March 16, 2006, because it determined that "no known small business manufacturers...can supply the depth and breadth of the products required by the Government." AR at 78. The effect of the waiver was to allow intervenor to acquire the fruits and vegetables to be supplied under the contract from non-small businesses.

The Government notified bidders that intervenor M&S Foods was the successful offeror for the San Antonio zone. Plaintiff filed a size protest against M&S. The SBA Area Office sustained plaintiff's protest in April 2008. M&S was not a small business, according to SBA, because it relied upon a large business subcontractor to supply "primary and vital" requirements of the solicitation. *See* 13 C.F.R. § 121.103(h)(4). M&S appealed to the Office of Hearings and Appeals.

The SBA Office of Hearings and Appeals reversed the local office, holding that a waiver of the nonmanufacturer rule applies to all aspects of the solicitation. AR at 742 (*Size Appeal of M&S Foods Ltd. Co.*, SBA No. SIZ-4971 (July 14, 2008)). That is, the waiver permitted intervenor to use its large business subcontractor not only for the fruit and vegetables, but also for other necessary and incidental aspects of the contract. These included, for example, warehousing and distribution of the produce. The hearing officer ruled alternatively that M&S was eligible for award as a small business because it would perform the "primary and vital requirements" of the contract. *Id.*

Plaintiff appealed the hearing officer's decision to this court on July 22, 2008. The parties filed cross-motions for judgment on the administrative record, and we heard oral arguments on September 9. Counsel for the Government stated at oral argument that the Defense Logistics Agency intended to award the contract on September 17, 2008. Plaintiff asked that we issue an expedited ruling before then. We agreed to decide the matter and issue an abbreviated order before September 17. A detailed supporting opinion will follow.

This court reviews decision of the SBA's Office of Hearings and Appeals according to standards of the Administrative Procedures Act. *See* 28 U.S.C. § 1491(b)(4) (2000). We give deference to an SBA size determination "because of the SBA's 'quasi-technical administrative expertise and [its] familiarity with the situation acquired by long experience with the intricacies inherent in a comprehensive regulatory scheme." *LB&B Assocs., Inc. v. United States*, 68 Fed. Cl. 765,771 (2005) (quoting *Ceres Envtl. Servs., Inc., v. United States*, 52 Fed. Cl. 23, 33 (2002)). The administrative record establishes that the hearing officer's decision was not "irrational" or based upon an "erroneous application of the law." See LL&B Assocs,

68 Fed. Cl. at 771. We cannot sustain plaintiff's protest.

The Office of Hearings and Appeals determined that the waiver of the nonmanufacturer rule included the services to be provided by M&S's large business subcontractors. When a NAICS code is assigned to a solicitation, the contracting officer must determine which code "best describes the principal purpose of the product or service being acquired." 13 C.F.R §121.402(b). although we are unable to find in the Administrative Record where the contracting officer assigned a NAICS code, it is undisputed by the parties that the solicitation is for a manufacturing supply contract.

Issuance of a nonmanufacturer waiver allows offerors to subcontract with large businesses to provide the goods to be procured by the Government. In this case, for example, the large business provided the fruits and vegetables, and apparently made its facilities available for warehousing and distribution as well. The hearing officer ruled that Intervenor is not disqualified as "other than small" for providing such incidental services through a large business, so long as a nonmanufacturer waiver is in effect. The administrative law judge's determination that the waiver covered all aspects of the solicitation, including the warehousing and delivery requirements, was reasonable, as was his reliance on the agency's determination that no small business could supply all of the fruits and vegetables. The other requirements are merely incidental to the supply of the produce and are therefore covered by the waiver.

Plaintiff's motion for judgment on the administrative record is DENIED. Defendant's motion for judgment on the administrative record is GRANTED. Intervenor's motion for judgment on the administrative record is GRANTED. The Clerk of Court will dismiss plaintiff's complaint. No costs.

s/Robert H. Hodges, Jr.
Robert H. Hodges, Jr.
Judge

APPENDIX D

United States Small Business Administration
Office of Hearings and Appeals

SBA No. SIZ-4971

SIZE APPEAL OF:
M&S Foods Ltd. Co.

Appellant,

Appealed from
Size Determination No.
3-2008-37

July 14, 2008, Decided

APPEARANCES

Pamela J. Mazza, Isaias "Cy" Alba, IV, Piliero Mazza PLLC, Washington, D.C., for Appellant.

Johnathan M. Bailey, Bailey & Bailey, P.C., San Antonio, Texas, for Hardie's Fruit & Vegetable Co., Inc.

DECISION

HOLLEMAN, Administrative Judge:

I. Jurisdiction

This appeal is decided under the Small Business act of 1958, 15 U.S.C. §631 et seq., and 13 C.F.R. Parts 121 and 134.

II. Issue

Whether the size determination was based on clear error or fact or law. See 13 C.F.R. §134.314.

III. Background

A. The Procurement and Protest

On July 24, 2006, the Defense Logistics Agency (DLA) Defense Supply Center Philadelphia issued solicitation SPM300-06-R-0008 (solicitation). The purpose of the solicitation is to provide a full line of fresh fruit and vegetable support to Department of Defense (DOD) and non-DOD activities for twelve regions located throughout the United States. The Contracting Officer (CO) set the procurement totally aside for small business and assigned North American Industry Classification System (NAICS) code 424480, Fresh Fruit and Vegetable Merchant Wholesalers, with a corresponding 500 employee size standard.

On March 12, 2008, the CO notified unsuccessful offeror Hardie's Fruit & Vegetable Co., Inc. (Hardie's) that the apparent successful offeror for the San Antonio region was M&S Foods Ltd. Co. (Appellant).

On March 17, 2008, Hardie's filed a size protest with the CO. Hardie's asserted Appellant is other than small because of Appellant's affiliation with Fresh Point-City Produce, LP (City), a subsidiary of Fresh Point, Inc., a company owned by Sysco Corporation, a large business. Hardie's alleged Appellant must rely entirely on City because Appellant does not own produce storage or distribution facilities in Texas.

On March 18, 2008, the CO forwarded the size protest to the Small Business Administration (SBA) Office of Government Contracting – Area III (Area Office), in Atlanta, Georgia.

B. The Size Determination

On April 17, 2008, the Area Office issued its size determination. The Area Office acknowledged a waiver of the nonmanufacturer rule was granted for the procurement allowing a small business to buy from a large business. The Area Office stated that the waiver does not cede the prime contractor's responsibility to perform the primary and vital requirements of the contract.

The Area Office determined that the primary and vital requirements of the contract are the delivery and warehousing of the produce. The Area Office noted that Appellant is responsible for accounts and the day-to-day management of the procurement. However, the Area Office found Appellant is not capable of labeling, packaging, and distributing the produce. The Area Office determined that Appellant cannot perform the requirements of the procurement without City performing the more complex and costly requirements. Thus, based on the totality of the circumstances, the Area Office found Appellant is unusually reliant on its subcontractor and affiliated with City and Sysco Corporation. The Area Office deemed Appellant other than small for this procurement.

C. The Appeal

On April 22, 2008, Appellant filed the instant appeal with the Office of Hearings and Appeals (OHA). Appellant argues the Area Office's size determination finding Appellant is unduly reliant on City, under 13 C.F.R §121.103(h)(4), is based on clear error of fact and law. First, Appellant asserts the size determination contradicts a prior determination by the Area Office, issued on February 23, 2007, finding Appellant small for an identical procurement. Second, Appellant asserts the Area Office erroneously relied on the ostensible subcontractor rule even though the nonmanufacturer rule applies to the

procurement. Finally, Appellant argues the Area Office's assertions that Appellant is not performing the primary and vital requirements of the procurement are incorrect; Appellant states it is responsible for the management functions, sales and marketing, supply chain, proposal creation, customer service, and created and maintains the electric ordering system.

Based on the clear errors of law and fact, Appellant argues the Area Offices' size determination is arbitrary and capricious and requests OHA overturn it.

D. Hardie's Response

On May 8, 2008, Hardie's responded to Appellant's Appeal. Hardie's argue Appellant's Appeal should be dismissed for failure to comply with 13 C.F.R. §134.105 or, in the alternative, denied for failure to demonstrate legal or factual error.

Hardie's argues Appellant failed to comply with OHA's rules of procedure. Specifically, Hardie's asserts Appellant failed to list Hardie's on its Appeal certificate of service and failed to serve Hardie's with a copy of its Appeal as required by 13 C.F.R. §134.305. Hardie's states it was required to seek out and obtain a copy of the Appeal by its own efforts. Hardie's cites *Size Appeal of AQW, Inc.*, SBA No. SIZ-4359 (1999), to support its argument.

Moreover, Hardie's asserts Appellant's arguments based on a prior size determination are irrelevant. Hardie's states size determinations are procurement specific and non-binding. Additionally, Hardie's argues Appellant is incapable of performing the primary and vital requirements of the procurement and is completely dependent on Sysco. Finally, Hardie's states Appellant's reliance on Sysco is not excused because of the waiver of the nonmanufacturer rule.

E. Appellant's Reply to Hardie's Response

On May 12, 2008, I granted Appellant's May 12, 2008 Motion to Reply to Hardie's Response.

On May 19, 2008, Appellant filed a reply to Hardie's response. Appellant argues dismissal for inadequate service is inappropriate in this case. Appellant states its served Hardie's with a copy of the Appeal within two days of filing the Appeal, after Appellant reviewed the Appeal to ensure it did not contain proprietary information. Appellant argues the two-day delay did not prejudice Hardie's ability to prepare a comprehensive response. Appellant distinguishes the two-day delay in this case from *Size Appeal of AQW, Inc.*, SBA No. SIZ-4359 (1999), where the other party was not served prior to the close of record even after receiving explicit instructions from OHA to serve the other party.

Moreover, Appellant asserts Hardie's has mischaracterized its arguments. Appellant states that it is not arguing that an area office is bound by an earlier decision, but Appellant is questioning whether an area office may issue contradictory size determinations based on the same facts without explaining the discrepancy in outcomes. Appellant also disputes Hardie's depiction of Appellant's dependence on Sysco. Appellant asserts it has been supplying produce to customers for seven years and has numerous delivery sources. Appellant maintains it will be performing most of the primary and vital functions of the procurement and it is a legitimate wholesaler.

To clarify the facts relevant to the case, Appellant moved to submit four documents in support of its Reply to Hardie's Response: (1) an email to the contracting specialist; (2) two teaming agreements with small businesses; (3) a letter from a small business regarding this contract; and (4) Appellant's

listing in the Blue Book Services list of active firms in the wholesale fresh fruit and vegetable industry.

IV. Discussion

A. Timeliness

Appellant has filed its appeal within 15 days of receiving the size determination and, therefore, the appeal is timely. 13 C.F.R. §134.304(a)(1).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the Area Office size determination is based on a clear error of fact or law. 13 C.F.R. §134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the Area Office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the Area Office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

C. New Evidence

In accordance with 13 C.F.R. §134.308(a), new evidence may not be submitted on appeal unless the judge orders it *sua sponte* or a motion is filed and served establishing good cause for the submission of the new evidence. OHA has found good cause when the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal. *Size Appeal of Pointe Precision, LLC,* SBA No. SIZ-4434 (2001).

Appellant submitted three documents with its Appeal which are a part of the record because they are included in the Area Office file: (1) the February 23, 2008 size determination; (2) the April 17, 2008

size determination; and (3) Appellant's United States Department of Agriculture license to be a fresh and frozen produce wholesale dealer. Appellant pleads for the submission of four additional documents: (1) an email to the contracting specialist; (2) two teaming agreements with small businesses; (3) a letter from a small business regarding this contract; and (4) Appellant's listing in the Blue Book Services list of active firms in the wholesale fresh fruit and vegetable industry.

Appellant's arguments for inclusion of new evidence in support of its Reply to Hardie's Response are unpersuasive. A party is responsible for presenting all evidence to the Area Office. 13 C.F.R. 121.1009(b). A party cannot submit evidence on appeal it neglected to submit at the protest stage. *Size Appeal of Carriage Abstract, Inc.*, SBA No. SIZ-4430 (2001). Appellant has not established good cause to enlarge the record to incorporate the proffered documents. Therefore, the motion for submission of new evidence is DENIED and I EXCLUDE Appellant's additional information from the record.

D. The Nonmanufacture Rule

The nonmanufacturer rule, 13 C.F.R. § 121.406(b), allows a small business to provide goods under a manufacturing contract if: (1) it has less than 500 employees; (2) is primarily engaged in wholesale or retail trade; and (3) provides the end item of a small business manufacturer or processor. However, when no small business can provide a product meeting the specifications of a solicitation, the SBA Associate administrator for Government Contracting can grant an individual waiver of the nonmanufacturing rule. The waiver allows a small business to be complaint without enforcing the third prong of the nonmanufacturing rule, i.e. without providing the end item of a small business manufacturer or processor.

E. Waiver of the Nonmanufacture Rule

In this case, an individual waiver, 13 C.F.R. § 121.406(b)(3)(i), for this procurement was granted on March 16, 2006. The individual waiver is based on information that no small businesses "can supply depth and breadth of products required" and covers the purchase of items for the duration of the contract. Waiver for SPM300-06-R-0008, dated March 16, 2008.

It is undisputed that Appellant, with seven employees, meets the first prong of the nonmanufacturer rule and, despite Hardie's arguments to the contrary, the record support that Appellant is a wholesale dealer of fresh and frozen produce. Thus, the critical question for this case is what is the extent of the waiver of the nonmanufacturer rule for this procurement; specifically, does this waiver include warehousing and delivery.

In investigating the extent of the waiver, I am mindful that this is an individual waiver specific to this procurement. An individual waiver is more comprehensive in scope than a less specific class waiver because SBA has already completed a review of the precise requirements of the product and supply chain before granting a waiver for the solicitation. The language of the waiver states: "A waiver of the Nonmanufacture Rule is hereby established for the purchase to cover the line of various fresh fruits and vegetables in the [Produce Prime Vendor], under contract number SMP300-06-R-0008."

Waiver for SPM300-06-R-0008, dated March 16, 2008. The waiver does not exclude warehousing and deliveries of the perishable produce. The waiver applies to the whole procurement.

The solicitation also acknowledges a waiver of the nonmanufacturer rule was issued by SBA to allow small businesses "to procure products from large

businesses." The solicitation does not limit the extent of the waiver of the nonmanufacturer rule. The solicitation does indicate that the four primary evaluation criteria for the procurement are the business's: (1) food safety, inventory turnover, product freshness, and temperature and humidity control is maintaining fresh produce; (2) experience on contracts similar in size and scope; (3) distribution plan; and (4) use of DLA Mentoring Businesses Agreement, with the most comprehensive plans assisting new business ventures with small businesses receiving the highest ratings.

Based on the text of the waiver, the solicitation, and the unique temperature, food safety, and inventory requirements in buying, storing, and delivering fresh produce, it is clear the individual waiver applies to the entire procurement, including warehousing and delivery of the produce. SBA granted the CO's request for a waiver of the nonmanufacturer rule for this procurement without limitations. SBA accepted the CO's determination that no small business manufactures are capable of performing the contract in accordance the government's specifications. Therefore, it was clear error for the Area Office to attempt to constrain a waiver of the nonmanufacturer rule specifically granted for this procurement and inappropriate for the Area Office to find Appellant other than small due to unusual reliance on a subcontractor.

The Area Office had an opportunity to examine the waiver of the nonmanufacturer rule for a February 23, 2007 size determination for a predecessor contract. At that time, SBA did not reveal limits on the extent on the waiver and, in fact, determined Appellant to be small for the procurement. The record before me does not explain why the Area Office has abruptly changed course from its earlier size determination. However, if the analysis in the size determination underlying this appeal is adhered to, the nonmanufacturer rule waiver granted

for this procurement would not serve its intended purpose.

Furthermore, the solicitation places significant importance on the successful awardee's customer service and support functions. The solicitation requires the successful awardee to: maintain an electronic catalog of items available; have a dedicated customer service representative; provide weekly produce market forecasts; interface with the government's web-based ordering tool; insure produce availability; invoice transactions; create electronic reports; and direct appropriate quantities of produce to the proper locations at the best price. These are all requirements Appellant is responsible for performing without reliance on City. Moreover, in addition to quality assurance, DLA placed considerable weight on a business's experience on contracts similar in size and scope when evaluating proposals and DLA also placed significance on a business's distribution plan. The record establishes that Appellant has seven years experience supplying multiple sites in the southern United States. Thus, even if SBA did not grant a waiver of the no manufacture rule, the record does not support the Area Office's determination that City is performing the primary and vital requirement of the contract.

Since the SBA did issue an individual waiver of the nonmanufacturer rule, the Area Office committed a clear error of law when it determined Appellant was unusually reliant upon City and thus affiliated with them under the ostensible subcontractor rule. 13 C.F.R. §121.103(h)(4). Accordingly, Appellant is small concern for the instant procurement.

V. Conclusion

For the above reasons, I REVERSE the Area Office's size determination and find Appellant M&S Foods Ltd. Co., is a small business for the instant DLA procurement.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. §134.316(b).

s/Christopher Holleman
CHRISTOPHER HOLLEMAN
Administrative Judge

APPENDIX E

28 U.S.C.A. § 2106

United States Code Annotated
Title 28. Judiciary and Judicial Procedure
Part V. Procedure
Chapter 133- Review--Miscellaneous Provisions
§2106: Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Supreme Court, U.S.
FILED
MAY 26 2010
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No. 09-840

In the Supreme Court of the United States

HARDIE'S FRUIT AND VEGETABLE CO.-SOUTH, LP,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals permissibly exercised its discretion when it denied petitioner's request for vacatur of decisions of the Court of Federal Claims (CFC) and the Small Business Administration after petitioner's appeal of the CFC's decision became moot.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 13-14) is unreported, but is available at 2009 WL 5606132. The order of the Court of Federal Claims (Pet. App. 15-19) is unreported. The decision of the Small Business Administration (Pet. App. 20-30) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2009. A petition for rehearing was denied on October 1, 2009 (Pet. App. 11-12). The petition for a writ of certiorari was filed on December 30, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Defense Logistics Agency (DLA), a component of the Department of Defense, solicited bids to supply fresh fruits and vegetables to numerous government facilities in 12 separate regions of the country. Pet. App. 15-16, 21. Under regulations promulgated by the Small Business Administration (SBA) pursuant to the Small Business Act, 15 U.S.C. 631 *et seq.*, competition for the contracts was limited to small businesses. See Pet. App. 21.

The SBA regulations provide that, in order to qualify for a supply contract of this kind, a small business must, *inter alia*, make the end-product itself or purchase it from another small business. 13 C.F.R. 121.406(b). That requirement is known as the "nonmanufacturer rule." Pet. App. 26. The SBA may grant a solicitation-specific waiver of that requirement if no small business can provide a product meeting the specifications of the contract. *Ibid.* The DLA sought and obtained a waiver of the nonmanufacturer rule for the fruit and vegetable solicitation at issue here. *Id.* at 27.

2. The DLA awarded the contract for the San Antonio region to M&S Foods Ltd. Co (M&S). Petitioner then filed a "size protest" with the SBA, alleging that M&S did not meet the small-business requirements because it relied on a large business for storage and distribution services in fulfilling the contract. Pet. App. 21. The SBA Office of Hearings and Appeals determined that the "critical question" was whether the applicable waiver of the nonmanufacturer rule was limited to the purchasing of produce from a large business or also extended to storage and delivery services. *Id.* at 27. Noting that the waiver was specific to this particular procurement, the SBA concluded that, under the terms of

the solicitation, the waiver applied to the entire procurement, including warehousing and delivery. *Id.* at 28-29. Accordingly, the SBA found M&S to be a small business for purposes of this procurement and rejected petitioner's size protest. *Id.* at 29.

3. Petitioner challenged the SBA's decision in the United States Court of Federal Claims (CFC). The CFC found the SBA's decision to be reasonable and ruled in favor of the government. Pet. App. 18. Petitioner then appealed to the United States Court of Appeals for the Federal Circuit.

4. After briefing but before oral argument in the court of appeals, DLA decided for reasons unrelated to this litigation to cancel the procurement for the San Antonio region. See Pet. C.A. Suggestion of Mootness & Req. for Vacatur, Ex. 1 (Suggestion of Mootness). The cancellation rendered moot the issues on appeal. Petitioner filed a motion for voluntary dismissal and for vacatur of the trial court and SBA decisions.

The government agreed that voluntary dismissal of petitioner's appeal was appropriate, but it opposed the vacatur request. The court granted the dismissal but denied, without opinion, petitioner's request for vacatur. Pet. App. 13-14. The court subsequently denied petitioner's request for panel rehearing and for rehearing en banc. *Id.* at 11-12.

ARGUMENT

The court of appeals' unpublished order denying the motion to vacate is not precedential, contains no legal analysis, and creates no conflict with any decision of this Court or any other court of appeals. In the particular circumstances of this case, moreover, the order represents a permissible exercise of the court of appeals'

judgment on a matter within its equitable discretion. Accordingly, further review is unwarranted.

1. Petitioner's motion to vacate was denied in an unpublished order signed for the Court by the Clerk. Pet. App. 13-14. The order includes no discussion or legal analysis, but simply states in relevant part that, upon consideration of the motion to vacate and the United States' opposition, "[t]he motion to vacate is denied." *Id.* at 14. The order thus does not set forth any legal principles that could conflict with the precedents of this Court or other courts of appeals, and it does not purport to decide any question of federal law "that has not been, but should be, settled by this Court." Sup. Ct. R. 10. Nor does petitioner suggest that this case reflects any pattern or practice by the court of appeals. In a precedential decision issued approximately eight months after the decision in this case, the Federal Circuit vacated a portion of a trial court's judgment that had become moot in order to clear the path for future relitigation. See *Jade Trading, LLC* v. *United States*, 598 F.3d 1372, 1381 (2010). See also, *e.g.*, *Kaw Nation* v. *Norton*, 405 F.3d 1317, 1323-1325 (Fed. Cir. 2005) (vacating agency decision that became moot on appeal).

There is consequently no need for this Court's intervention in this case.

2. The court of appeals' denial of the motion to vacate was a permissible exercise of equitable discretion under the circumstances of this case.

Under 28 U.S.C. 2106, a federal court of appeals "may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review." While Section 2106 authorizes vacatur of lower-court judgments, it does not specify any circumstance under which vacatur is required. See

Alvarez v. *Smith*, 130 S. Ct. 576, 581 (2009) (describing Section 2106 as "flexible").

As petitioner explains, vacatur is typically an appropriate remedy when mootness prevents a party from pursuing an appeal of a lower-court ruling. See, *e.g.*, *Alvarez*, 130 S. Ct. at 581; *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 71-72 (1997); *Great W. Sugar Co.* v. *Nelson*, 442 U.S. 92, 93 (1979) (per curiam). This Court has made clear, however, that because vacatur is an equitable remedy, its use in particular cases reflects the exercise of judicial discretion rather than the application of rigid rules. For that reason, vacatur of a lower-court (or administrative) judgment is not automatic when an appeal becomes moot before decision.

In *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18 (1994) (*Bancorp*), the Court explained that it has "disposed of moot cases in the manner most consonant to justice in view of the nature and character of the conditions which have caused the case to become moot." *Id.* at 24 (ellipsis, internal quotation marks, and citation omitted). The Court in *Bancorp* held that, as a general matter, "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 29. The court explained that a losing party who chooses to settle "has voluntarily forfeited" his right of appeal and has "thereby surrender[ed] his claim to the equitable remedy of vacatur." *Id.* at 25. The Court emphasized, however, that its holding was not absolute because "the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of" vacatur even when mootness results from settlement. *Id.* at 29.

Conversely, while vacatur is ordinarily appropriate when mootness occurs through "happenstance," *Ban-*

corp, 513 U.S. at 23, 25, the Court has not held that vacatur is categorically required in that circumstance. The Court in *Bancorp* stated that the party seeking this form of relief bears the "burden" of demonstrating "equitable entitlement to the extraordinary remedy of vacatur." *Id.* at 26. Courts of appeals have likewise recognized that "vacatur is an equitable remedy rather than an automatic right." *Khodara Envtl. Inc.* v. *Beckman*, 237 F.3d 186, 194 (3d Cir. 2001) (Alito, J.); *National Black Police Ass'n* v. *District of Columbia*, 108 F.3d 346, 351 (D.C. Cir. 1997) (same); see *Staley* v. *Harris County*, 485 F.3d 305, 310 (5th Cir.) ("vacatur is to be determined on a case-by-case basis, governed by facts and not inflexible rules"), cert. denied, 552 U.S. 1038 (2007).

Petitioner asserts (Pet. 6) that "vacatur is always appropriate where mootness results from the unilateral action of the prevailing party below." Whatever the merits of that legal theory, it does not govern this case because the mootness here was not caused by the "unilateral action of the prevailing party." Although the United States was the named defendant in the CFC, petitioner's challenge was to a determination of the SBA. See Pet. App. 15-16. The procuring agency that cancelled the solicitation at issue was the DLA, which had no involvement in the present lawsuit challenging SBA's determination. See *id.* at 15-16, 21-22.

The case was mooted for reasons unrelated to this litigation by the "unilateral action" of a federal agency, DLA, that is not a party to the suit. See Suggestion of Mootness, Ex. 1. This case therefore involves mootness by "happenstance" rather than by the "unilateral action of the prevailing party." Cf. *Alvarez*, 130 S. Ct. at 581 (Court finds "mootness through 'happenstance'" where,

in challenge to constitutionality of state procedures for seizure of property without a warrant, parties resolved underlying property disputes for reasons unrelated to the pending federal lawsuit.); *National Black Police Ass'n*, 108 F.3d at 352 ("The mere fact that a legislature has enacted legislation that moots an appeal, without more, provides no grounds for assuming that the legislature was motivated by * * * a manipulative purpose.").

Because the court of appeals did not issue an opinion or otherwise explain its decision to deny petitioner's request for vacatur, it is not clear how the court weighed the equities. As the government pointed out in its opposition to vacatur, however, such relief was unnecessary to ensure that petitioner could assert any legal challenge it might have if it were injured by a similar size determination in a future procurement. See Gov't Resp. to Suggestion of Mootness 2-3 (Gov't Resp.).[1] The dispositive question in the CFC involved the scope of the SBA's waiver of the nonmanufacturer rule. As petitioner noted before the SBA, the scope of the waiver is specific to the particular solicitation to which it applies. Pet. App. 23 ("size determinations are procurement specific"); *id.* at 27 ("this is an individual waiver specific to this procurement"). Thus, in resolving this case, the CFC addressed

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[1] In opposing petitioner's request for vacatur in the court of appeals, the government also argued that vacatur of the challenged administrative decision "could result in confusion and uncertainty at the SBA regarding the legitimacy of" similar SBA size determinations. See Gov't Resp. at 3-4. That concern, however, does not provide an independent justification for the court of appeals' refusal to vacate the decisions below. Properly understood, vacatur for mootness does not suggest disagreement with the ruling that is vacated, and the possibility that a vacatur order could be misconstrued is not a sufficient reason to deny that equitable remedy if it is otherwise appropriate.

only the application of the particular waiver at issue to the successful bid by M&S.

DLA has now cancelled the procurement for the San Antonio region that it awarded to M&S. That cancellation had the effect not only of mooting petitioner's challenge to the award but also of rendering irrelevant the individual waiver attached to the underlying procurement.[2] Any future procurement for which petitioner might compete will be governed by a new waiver (if the SBA chooses to waive the nonmanufacturer rule), and the interpretation of that waiver will not be controlled by the CFC's decision. Thus, the cancellation of the procurement at issue, which rendered the waiver null, left petitioner free to challenge any future award based on the terms of any subsequent waiver.[3]

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[2] As noted above, see p. 2, *supra*, the DLA sought separate bids for 12 different regions of the country, and the procurements for other geographical areas resulting from that solicitation are governed by the same waiver as the one at issue below. The existence of those other procurements, however, does not create any meaningful likelihood that a subsequent dispute will arise in which the judicial and administrative decisions below would be given preclusive effect. Petitioner did not challenge any of the other awards that were based on the solicitation, and it is now time-barred from doing so. See 13 C.F.R. 121.1004(a) (providing that size protests must be made within five business days of the date on which the prospective awardee is announced).

[3] Petitioner cites the SBA's decision in *Allied Painting & Decorating Co.*, SBA No. SIZ-3026, 1998 WL 219932 (S.B.A. 1988), in arguing that, if the decisions of the CFC and SBA are not vacated and DLA issues a new solicitation for the same procurement, petitioner's protest of that solicitation will be barred. Pet. 7-8. In *Allied Painting*, the protestor's first size protest concerned the legal question whether, in making a size determination, average annual receipts of the business's affiliates should be considered. In a later size protest involving the same parties, the protestor raised the same legal argument, and the SBA held the argument to be barred as *res judicata*. Here, unlike in *Allied Painting*,

As a general matter, vacatur of moot cases (outside the settlement context) is appropriate because it "clears the path for future relitigation of the issues between the parties." *Alvarez*, 130 S. Ct. at 581 (quoting *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 40 (1950)). Because vacatur was not necessary to accomplish that purpose in this case, the court of appeals did not abuse its equitable discretion in denying such relief. See, *e.g.*, *Westmoreland* v. *National Transp. Safety Bd.*, 833 F.2d 1461, 1463 (11th Cir. 1987) (per curiam) (noting that, "[r]ather than apply[ing]" the vacatur rules "automatically," courts "should look to the policies behind *Munsingwear* * * * to see if they are implicated"). And for essentially the same reason, any error the court may have committed in declining to vacate the decisions of the SBA and the CFC lacks any practical significance and does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2010

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the SBA and CFC decisions are specific to the waiver at issue in this procurement. Neither the SBA nor the CFC set forth any general legal principles that would be binding upon petitioner (or any other protestor) in the protest of a future solicitation.